

Appeal from a decision of the Montana State Office, Bureau of Land Management, declaring mining claims null and void ab initio. M MC 73370, M MC 78500, and M MC 88381.

Affirmed in part and set aside and remanded in part.

1. Act of August 11, 1955--Mining Claims: Withdrawn Land--Mining Claims Rights Restoration Act--Powersite Lands--Withdrawals and Reservations: Powersites

Lands which are covered by a license for a power project issued by the Federal Power Commission (now the Federal Energy Regulatory Commission) are not open to mineral location. Any mining claim located on powersite lands is void ab initio unless the land has been restored to such entry in accordance with sec. 24 of the Federal Power Act, 16 U.S.C. § 818 (1976).

2. Mining Claims: Withdrawn Land--Withdrawals and Reservations: Reclamation Withdrawals

A mining claim located on land previously withdrawn from appropriation under the mining laws by a first form reclamation withdrawal is null and void ab initio.

APPEARANCES: Ronald B. McLean, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Ronald B. McLean appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated January 13, 1983, declaring null and void ab initio part of the Montana #1 and Retread Placer #10 placer mining claims and the Montana #2 placer mining claim in its entirety.

The Montana #1 and Retread Placer #10 claims were declared null and void in part because BLM found these claims had been located in part within the Hauser Lake Power Plant Project Boundary 2188. In support of its decision, BLM provided appellant with a photocopy of a letter from the Federal Energy Regulatory Commission (FERC), dated December 29, 1982, referring to location notices M MC 73364 and M MC 78500. This letter noted that

location notices M MC 73364 and M MC 78500 describe land in sec. 4, lot 10, T. 10 N., R. 1 W., Montana Principal meridian. A portion of this land, the FERC letter continued, lies within the boundaries of project 2188 as presently licensed. That portion lying within the project boundaries is not open to mineral location, the FERC letter stated. BLM master title plats confirm the fact of a withdrawal for power project 2188 in sec. 4, T. 10 N., R. 1 W., inter alia, effective April 23, 1956. Appellant's claims were located in 1981.

[1] Section 2 of the Mining Claims Rights Restoration Act of 1955, 43 U.S.C. § 621 (1976), provides in part:

(a) All public lands belonging to the United States heretofore, now or hereafter withdrawn or reserved for power development or power sites shall be open to entry for location and patent of mining claims and for mining, development, beneficiation, removal, and utilization of the mineral resources of such lands under applicable Federal statutes: * * * And provided further, That nothing contained herein shall be construed to open for the purposes described in this section any lands (1) which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress. [Emphasis in original.]

In Lairy D. Brookshire, 56 IBLA 73 (1981), the Board applied section 2 to affirm a BLM decision declaring null and void ab initio mining claims located within lands withdrawn for powersite purposes. Therein we stated:

Pursuant to section 2(a) of the Mining Claim Rights Restoration Act, as amended, 30 U.S.C. § 621(a) (1976), land which is covered by a license for a power project issued by FERC is not open to mineral entry and any mining claim located on such land is void ab initio, unless that land has been restored to such entry in accordance with section 24 of the Federal Power Act, 16 U.S.C. § 818 (1976). Harold M. Voris, 48 IBLA 206 (1980), and cases cited therein.

To the extent that appellant's claims are located on lands included in a project operating or being constructed under a license issued by FERC, BLM's decision invalidating such claims must be affirmed. We note, however, that the FERC letter of December 29, 1982, referred to claims M MC 73364 and M MC 78500. The file indicates that serial number M MC 73364 has been assigned to neither the Montana #1 nor to the Retread #10 placer claims. Serial number M MC 78500 identifies the Montana #1 claim. The FERC letter, therefore, provides no support for invalidating the Retread #10 placer mining claim. 1/ On the basis of the record, we are unable to say whether any part of the Retread #10 lies within the boundaries of project 2188. Accordingly, the BLM decision is set aside in this respect and the case remanded for BLM's reconsideration of the validity of the Retread #10.

1/ The location notice for this claim lists Ronald B. McLean, agent, Bernice McLean, Walter Madill, and Ethel Madill as the locators. Although BLM's decision of Jan. 13, 1983, was addressed to each of these individuals, only Ronald B. McLean has filed a notice of appeal from the decision.

A map presumably sketched by appellant of the location of the Montana #1 claim shows this claim wholly outside the boundaries of project 2188 (BLM file M MC 78500). The file does not contain a sketch by BLM showing whether or not the claim is within the project's boundaries. The record is, therefore, unclear as to situs of the claim in relation to the project's boundaries. To the extent that the claim lies within project boundaries, however, BLM's decision invalidating the claim in part must be affirmed.

[2] BLM's decision also declared null and void ab initio the Montana #2 placer mining claim (M MC 88381) in its entirety because BLM found the claim to be located on lands segregated from mineral entry by a reclamation withdrawal effective March 15, 1946. Appellant does not dispute this finding in his statement of reasons, preferring instead to assure BLM that he will not interfere with BLM's use of a nearby maintenance road.

The record contains a copy of a recommendation for First Form Reclamation Withdrawal, submitted February 5, 1946, seeking the withdrawal from public entry of lands described therein. On March 15, 1946, this recommendation was approved by the Acting Secretary. The effect of such a withdrawal is set forth succinctly in Elmer G. Thomas, 66 IBLA 92 (1982): "It is well settled that a mining claim located on land withdrawn from mineral entry by a first form reclamation withdrawal order is properly declared null and void ab initio." Although appellant's statement of reasons does not dispute that the Montana #2 is entirely within the reclamation withdrawal of March 15, 1946, a sketch presumably submitted by appellant in file M MC 88381 raises a doubt whether all of the Montana #2 claim is within withdrawal boundaries. BLM has again provided no sketch of its own to show the location of the Montana #2 claim vis a vis the withdrawal boundaries.

In any event, to the extent the Montana #2 is not within the withdrawn area, it would overlap lot 5 which is land patented without a mineral reservation. Such portion of the claim would necessarily be null and void for this reason. Thus, the exact situs of the claim is irrelevant to the ultimate conclusion as to its invalidity.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed in part and set aside and remanded in part.

Anne Poindexter Lewis
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Franklin D. Arness
Administrative Judge
Alternate Member

